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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (A. 52-68) is reported at 290 A. 2d 573.

JURISDICTION

The judgment of the District of Columbia Court of Appeals (A. 69) was entered on April 28, 1972. The jurisdictional statement was filed on June 30, 1972. The jurisdiction of this Court was invoked under 28 U.S.C. 1257(2) and alternatively under 28 U.S.C. 1257(3). On October 10, 1972, this Court entered an order (A. 72) postponing probable jurisdiction to the hearing of the case on the merits.

493-701—73——2

QUESTIONS PRESENTED

1. Whether an act of Congress applicable exclusively to the District of Columbia is to be deemed "a statute of any state" within the meaning of 28 U.S.C. 1257(2), so as to authorize an appeal to this Court from a decision of the District of Columbia Court of Appeals sustaining such an act against a constitutional challenge.

2. Whether the local court system established under the District of Columbia Court Reorganization Act of 1970 is governed by Article III of the Constitution, relating to the creation of the federal courts and the tenure of federal judges.

3. Whether the stopping of appellant while he was driving an automobile, for the purpose of inspecting his driver's permit and vehicle registration certificate, constituted an unreasonable seizure in violation of the Fourth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the Constitution provides in pertinent part:

> The Congress shall have Power * * *
>
> * * * * * *
>
> [cl. 9] To constitute Tribunals inferior to the Supreme Court;
>
> * * * * * *
>
> [cl. 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Con-

gress, become the Seat of the Government of the United States * * *.

* * * * *

Article III, Section 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour * * *.

Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure * * * against unreasonable searches and seizures, shall not be violated * * *.

28 U.S.C. 1257 provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitu-

tion, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Section 11–923(b) of the District of Columbia Code (Supp. IV, 1971) provides in pertinent part:

> * * * the Superior Court has jurisdiction of any criminal case under any law applicable exclusively to the District of Columbia.

* * * * *

Section 22–3204 of the District of Columbia Code (1967 ed.) provides in pertinent part:

> No person shall within the District of Columbia carry either openly or concealed on or about his person * * * a pistol, without a license therefor issued * * *. Whoever violates this section shall be punished [by fine not exceeding $1,000, or imprisonment for not more than one year, or both] unless the violation occurs after he has been convicted * * * of a felony * * * in which case he shall be sentenced to imprisonment for not more than ten years.

STATEMENT

After a bench trial in the Superior Court of the District of Columbia, appellant[1] was convicted of the felony of carrying an unregistered pistol in the District of Columbia after having previously been convicted of a felony, in violation of D. C. Code § 22–3204. He was sentenced to imprisonment for from two to six years; however, all but six months of the imprisonment was suspended and appellant was placed on probation for six years (A. 1, 50).

The facts surrounding the discovery of the unregistered pistol were fully and accurately stated by the court below as follows (A. 61–62):

> Officers Busker and Morrissette of the Special Operations Division of the Metropolitan Police Department were in plain clothes and an unmarked police car parked on "T" Street when appellant drove by in the early evening of January 16, 1971. Officer Busker knew from the Virginia license tags on appellant's car that the vehicle had been rented. They decided to run a so-called "spot check" to determine if the appellant had a proper license and rental agreement (the equivalent of proper registration). [2] Appellant had committed no moving traffic violation and his auto had no apparent equipment defect.

[1] Whether the appeal in this case is authorized by law is one of the questions before the Court. For the sake of uniformity we shall refer to the defendant below as the "appellant".

[2] Appellant was required to have these documents in his immediate possession while driving in the District of Columbia. D.C. Code (1967 ed.) 40–104(a), 40–301(c).

The officers followed appellant's car as it made an acute angle left turn from "T" Street onto Florida Avenue and then proceeded northwest on Florida for a few blocks until the officers waved appellant to a stop near the corner of Florida and Vermont Avenues. Appellant alighted immediately and met Officer Busker near the left rear area of his car, while the other officer proceeded to the right front area of the auto. Officer Busker asked for and received from appellant his driver's license. However, when asked for the rental agreement for the vehicle, appellant entered the car and retrieved it from the glove compartment. The agreement by its terms had expired on the previous Tuesday, January 12th. Appellant explained (and his story was later verified by the car rental agency) that he had modified the agreement orally prior to its expiration and that, although the written agreement did not so indicate, he was in fact entitled to drive the car by reason of the oral extension of his rental period.

During this conversation between Officer Busker and appellant on the left side of the car, Officer Morrissette was glancing at the interior of the vehicle by means of a flashlight. He testified at trial that his presence in that position and his use of the flashlight were standard operating procedure to protect the safety of the other officer who was endangered by the possibility that the driver, retrieving

> something from his car, might pull out a weapon and assault the officers. Officer Morrissette then noticed the trigger mechanism of a pistol protruding out from beneath the armrest on the front of appellant's car. He removed the pistol from appellant's auto and, after learning that it was unregistered, placed appellant under arrest * * *. [Original footnotes and citation omitted.]

Jurisdiction over appellant's prosecution, and over other criminal cases under any law applicable exclusively to the District of Columbia, was conferred on the Superior Court by Congress in the District of Columbia Court Reorganization Act of 1970, Pub. L. 91-358, 84 Stat. 473, *et seq.* See D.C. Code § 11-923(b). Judges of the Superior Court are appointed by the President and serve for terms of fifteen years. D.C. Code §§ 11-1501(a), 11-1502. Prior to trial, appellant moved to dismiss the indictment on the ground that the Superior Court lacked jurisdiction to try him for a felony; his claim was that only a court whose judges serve during their "good Behaviour" may constitutionally exercise jurisdiction over a felony prosecution under the District of Columbia Code. He also moved to suppress the pistol on the ground that it was discovered as the result of an unlawful search. Both motions were denied. The District of Columbia Court of Appeals affirmed the conviction (A. 52-69), and this appeal followed.

SUMMARY OF ARGUMENT

I

The judgment below sustained the constitutionality of the provision of the District of Columbia Superior Court Reorganization Act of 1970 that conferred jurisdiction on the new District of Columbia Superior Court over all criminal cases arising "under any law applicable exclusively to the District of Columbia." This raises the question whether a congressional enactment applicable exclusively to the District of Columbia, such as the provision upheld below, is a statute of a state or of the United States for purposes of this Court's jurisdiction under 28 U.S.C. 1257. If such enactment is a state statute, appeal from the judgment below would be a matter of right; if it is a statute of the United States, however, this case lies only within the certiorari jurisdiction of this Court.

The statute upheld below was enacted by Congress into the District of Columbia Code and thus in a sense is a statute of the District of Columbia. However, this Court has repeatedly held that the District of Columbia is not a "state" for jurisdictional purposes. Moreover, the Court Reorganization Act was passed by Congress and signed by the President and therefore is, at least in common parlance, a statute of the United States rather than of a "state." And when Congress has intended its enactments of exclusively local application to be treated as state statutes for jurisdictional purposes, it has stated that intention expressly. See 28 U.S.C. 1363. Indeed, Congress

amended Section 1257 to provide expressly that the District of Columbia Court of Appeals should be considered as the "highest court of a State" for purposes of review under that Section but did not provide that acts of Congress applicable exclusively to the District of Columbia should be treated as "statutes of a state" for these purposes.

Furthermore, treatment of such congressional enactments as "statutes of the United States" for purposes of 28 U.S.C. 1257 comports with the principles of federalism and comity which underlie the statutory pattern set for this Court's review jurisdiction. That pattern represents a determination by Congress that a final judgment invalidating one of its enactments—which it deems presumptively constitutional—should be that of a federal court; Congress established the courts below to act as the functional equivalents not of federal courts but of state courts; but review as of right over decisions by the court below invalidating local acts of Congress depends, under the present statutory scheme, upon those acts being regarded as statutes of the United States. Conversely, Congress has not considered it appropriate to provide appeals as of right from the judgments of state and federal appellate courts sustaining its own enactments; review of judgments by such courts sustaining congressional enactments lies only within the certiorari jurisdiction of this Court; and there is no reason to believe that review as of right of similar judgments by the District of Columbia Court of Appeals was deemed by Congress to be uniquely necessary.

493-701—78——3

II

The judges of the local District of Columbia courts established by the Court Reorganization Act have limited tenure. Thus these courts are non-Article III "legislative" courts. The principal question raised by appellant is whether such legislative courts may constitutionally exercise jurisdiction over prosecutions of local District of Columbia felony offenses.

Appellant's contention that the courts below lacked constitutional jurisdiction to try his case is grounded in the argument that non-Article III courts may not try inherently judicial matters arising under the laws of the United States. But this argument is fundamentally mistaken. It is commonplace for state courts, which by definition are non-Article III courts, to exercise judicial power over cases arising under the laws of the United States. Their constitutional jurisdiction extends to both federal remedial and penal statutes. And in the nineteenth century state courts tried federal prosecutions as well.

It is well established that Congress may create legislative courts which are not subject to the Article III restrictions on tenure. Pursuant to this authority Congress has in the past established legislative courts for the adjudication of causes arising in federal enclaves, including the District of Columbia, and also for the resolution of a variety of matters peculiarly within the congressional domain.

Legislative courts, like state courts and courts ordained under Article III, can exercise jurisdiction over cases arising under the laws of the United States,

and this jurisdiction has long embraced "inherently judicial" matters. For example, the legislative courts in federal territories have always been courts of general jurisdiction, capable of trying a wide-ranging assortment of judicial matters, including criminal prosecutions. Thus, in the most complete sense, legislative courts exercise "judicial power."

Article I, Section 8, clause 17, of the Constitution grants Congress plenary power over the District of Columbia. This power naturally embraces the establishment of a court system for the adjudication of local disputes. Congress may establish non-Article III courts for federal enclaves and it has historically established such courts for the determination of minor non-federal causes in the District of Columbia. Moreover, there are substantial reasons why the local courts of the District of Columbia and the federal courts should have different constitutional identities. The federal judiciary was established to serve national purposes as a system of national tribunals. It was not intended that a local court system, designed to meet the ordinary adjudicative needs of persons residing or doing business in the District of Columbia, would be an integral part of that national judiciary. To the contrary, the need for flexibility in local administration and other practicalities of local government in the District of Columbia militate in favor of limited tenure for local judges. Nothing in this Court's decision in *O'Donoghue* v. *United States,* 289 U.S. 516, bars creation of a legislative court system of local subject-matter jurisdiction for the District of Columbia.

There is no constitutional ground for excluding local felony prosecutions from the jurisdiction of local legislative courts for the District of Columbia. Such courts have exercised jurisdiction over misdemeanors and petty offenses since 1801. And there is no distinction between misdemeanor and felony prosecutions constitutionally relevant to the assertion of jurisdiction. The nature of both proceedings involves the exercise of true judicial power.

III

Appellant's final contention is that the selective stop of his automobile for the purpose of inspecting his driving permit and vehicle registration certificate constituted an unreasonable seizure. But the District of Columbia, in common with most states, requires the operator of an automobile to have both permit and registration certificate in his possession, and selective stops are lawful and necessary in enforcing such statutes.

Thus this case differs fundamentally from *Terry* v. *Ohio*, 392 U.S. 1. Unlike an automobile driver, a pedestrian does not exercise a licensed privilege by walking, and it is therefore reasonable to require police to have a specific basis for detaining him against his will. But the operator of an automobile engaging in a regulated activity can have no reasonable expectation of privacy concerning disclosure of his driving permit and registration certificate. Moreover, unlike a search of the person, a spot check for compliance with motor vehicle regulations cannot reasonably be said to involve any indignity or personal affront.

Although appellant suggests that such inspections must be limited to road blocks and may not be selective, there appears to be no constitutional basis for that suggestion. The relative effectiveness of different inspection techniques is a matter appropriately left to the discretion of local officials and such officials may reasonably conclude that if permit and registration inspections are to be effective and serve as a credible deterrent, they must be selective and unannounced.

ARGUMENT

I. REVIEW BY THIS COURT OF A DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS UPHOLDING AN ACT OF CONGRESS IS BY CERTIORARI, NOT BY APPEAL

In its order setting this case for argument, this Court postponed the question of jurisdiction until the hearing of the case on the merits. The question is whether there is statutory basis for an appeal to this Court or whether appellant's papers should be treated as a petition for a writ of certiorari.

Section 1257 of the Judicial Code, 28 U.S.C., defines the jurisdiction of this Court to review final judgments of the highest courts of the several states and of the District of Columbia Court of Appeals. In relevant part, Section 1257(2) provides that a final judgment upholding the validity of "a statute of any state" against a claim that it is repugnant to the Constitution may be reviewed on appeal. It is on that subsection that appellant relies in contending that his challenge to the constitutionality of an act of Congress is properly here on appeal. It is the government's

position that review lies only by writ of certiorari under Section 1257(3), since the act whose validity has been drawn into question is a "statute of the United States" and not "a statue of any state" within the proper construction of Section 1257(2).

The court below upheld the validity of a provision of the District of Columbia Court Reorganization Act of 1970, Pub. L. 91-358, 84 Stat. 473, *et seq.*, against constitutional challenge. The provision in question, Section 111 of the Act, 84 Stat. 486 (D.C. Code § 11-923(b)), confers jurisdiction on the District of Columbia Superior Court over all criminal cases arising "under any law applicable exclusively to the District of Columbia." This provision is itself a statute "applicable exclusively to the District of Columbia." The jurisdictional issue thus presented is whether a statutory provision enacted by Congress but having only local applicability to the District of Columbia is a statute of a "state" or of "the United States" within the meaning of Section 1257.[*] The resolution of this issue will affect the Court's future dockets, for it may be anticipated that a significant portion of the caseload of the District of Columbia Court of Appeals will involve such "local" statutes.

On its face, of course, the language of Section 1257 makes this a certiorari case rather than an appeal

[*] The act of Congress here in question, the Court Reorganization Act, is not in its entirety applicable exclusively to the District of Columbia, for in addition to amending the District of Columbia Code it also amended, *inter alia*, several provisions of the Federal Judicial Code. See Section 172 of the Act, 84 Stat. 590.

case, and there are substantial reasons not to strain the language of Congress to expand the scope of the Court's obligatory jurisdiction.[*] While the challenged provision of the Court Reorganization Act applies only to the District of Columbia, the Act was passed by Congress and signed by the President and is therefore, within the ordinary meaning of the words, a "statute of the United States" rather than of "any state." Cf. *United States* v. *Vuitch*, 402 U.S. 62, 64–67 (holding that a criminal provision of the District of Columbia Code, applicable only in the District of Columbia, was an act of Congress included within the term "statute" for purposes of direct review under the Criminal Appeals Act, 18 U.S.C. (1964 ed.) 3731, *et seq.*). See also *District of Columbia* v. *Gannon*, 130 U.S. 227. Although the challenged statute was enacted into the District of Columbia Code, and in that sense may be a law of the District of Columbia, it is nevertheless not the "statute of any state." Indeed, on the merits of his Article III claim, appellant himself relies (Br. 22–24) on the fact that the criminal statute he violated is a "law of the United States," even though it applies only in the District of Columbia. And that statute, D.C. Code § 22–3204, is a law of the United States only because, like the provision of the Court Reorganization Act here in question, it is a statute enacted by Congress.

This Court has repeatedly held, with respect to related questions, that the District of Columbia is not

[*] See Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 36–38 (1972).

a "state" for jurisdictional purposes. *District of Columbia* v. *Carter*, No. 71–564, decided January 10, 1973; *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582; *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445. In the absence of compelling considerations militating toward a contrary interpretation, not present here, this Court should read Section 1257 in accordance with the terms used by Congress and hold that for purposes of that Section a statute which, like the provision here in question, is enacted by Congress is a statute of the United States and not of a "state," whether or not it is a statute of local application only.[4]

Appellant notes (Br. 16) that "[t]he entire thrust of [the] reorganization [of the District of Columbia court system] was to create a dual system of courts in the District of Columbia akin to the state-federal court systems existing in the several states" and argues (Br. 16–17) that, despite the literal language of Section 1257, the Congressional purpose would be furthered, at least as a purely formal matter, by treating congressional enactments of exclusively local application as state statutes for purposes of that section.

[4] The mixed local-federal nature of many congressional enactments applicable primarily to the District of Columbia further argues against the arbitrary classification of statutory provisions applicable exclusively to the District of Columbia as "state" statutes. As has been stated (note 8, *supra*), the Court Reorganization Act itself was of such a hybrid nature. But Section 1257 affords no basis for treating one portion of an act as a statute of a state, and another as a statute of the United States, for purposes of review by this Court.

But that determination was for Congress to make, and it did not do so. There is little reason to impute such a design to Congress in the absence of a specific direction that some of its statutes should be regarded as "state" statutes for purposes of appellate review. In amending Section 1257 to provide for review by this Court of the judgments of the court below, Congress expressly provided that that court is to be treated as "the highest court of a State," while at the same time refraining from treating acts of Congress applicable exclusively to the District of Columbia as "statute[s] of any state." In other provisions of the Court Reorganization Act, Congress showed that, when it intended that its statutes of exclusively local application should be treated as the statutes of a state, it could make that result explicit. Thus, Congress amended the Judicial Code to provide that, for purposes of statutes defining the jurisdiction of the federal district courts, laws applicable exclusively to the District of Columbia should not be considered "laws of the United States" or "Acts of Congress." See Section 172(c)(1) of the Act, adding 28 U.S.C. 1363. The fact that Congress abstained from specifying that result under Section 1257 is therefore not without significance.

Moreover, as this Court has recently observed, "[w]hether the District of Columbia constitutes a State * * * within the meaning of any particular statutory * * * provision depends upon the character and aim of the specific provision * * *." *District of Columbia* v. *Carter, supra,* slip op. 2–3. The treat-

ment of congressional enactments for the District of Columbia as statutes of the United States, rather than of a state, for purposes of review by this Court under Section 1257 of the Judicial Code promotes both the policy of that section and the aims of the appeal-certiorari distinctions drawn for review of decisions of federal courts of appeals and of state courts, respectively, by Sections 1254 and 1257 of the Judicial Code. These distinctions reflect basic principles of federalism and comity as implemented by the Supremacy Clause of Article VI of the Constitution.

The review provisions represent at least in part a determination by Congress that a final judgment invalidating one of its statutes—which it deems presumptively constitutional—should be the judgment of a federal court.[8] But as appellant recognizes (Br. 16), Congress established the District of Columbia courts

[8] The distinction between mandatory and permissive review is based on this principle. Thus, a judgment by a federal court of appeals invalidating a statute of the United States is reviewable by this Court only on a writ of certiorari, but there is an appeal as of right to this Court for review of a similar judgment by the highest court of a state. See 28 U.S.C. 1254(1), 1257(1). Conversely, similar principles of federalism and comity explain why decisions involving "state" statutes are reviewable by different modes. If a federal court of appeals invalidates a state statute on federal constitutional grounds, an appeal as of right lies to this Court as the arbiter of the federal system. 28 U.S.C. 1254(2). If a state court, however, invalidates a state statute on such grounds, further review by this Court is a matter of discretion. 28 U.S.C. 1257(3). But if the state court upholds one of its statutes against federal constitutional challenge, an appeal lies to this Court to insure that the state enactment accords with the federal constitution. 28 U.S.C. 1257(2).

to act as the functional equivalents not of federal courts but of state courts. These courts were established as local courts for the adjudication of primarily local, nonfederal issues and thus serve an essentially "state" function in our federal system. Therefore a judgment by the court below *invalidating* an act of Congress would be equivalent to a state court judgment from which appeal as of right is appropriate. But acts of Congress, whether of local or national application, are still the legislative enactments of the federal government. To preserve an appeal as of right from the judgment of an essentially "state" court invalidating any congressional enactment under Section 1257, all such enactments must be treated as statutes of the United States.

Similarly, Congress has not provided an appeal as of right from the judgments of state courts, or of federal courts of appeals, sustaining its own enactments. See 28 U.S.C. 1254 and 1257. Yet appellant's reading of Section 1257(2) would mean that Congress so mistrusted its own enactments for the District of Columbia that it believed review by this Court should be mandatory when they are *sustained*. The result of this construction urged by appellant would be that the only time an appellate judgment *sustaining* an act of Congress would be reviewable on appeal to this Court would be from a decision of the District of Columbia Court of Appeals. There is no basis in principles of federalism or comity, and nothing in the legislative history of the Court Reorganization Act, to suggest

that Congress saw any need to create a unique right to review of the decisions of the new "state" court upholding its acts.

A literal reading of Section 1257—construing all congressional enactments to be statutes of the United States—comports with existing congressional policies with respect to this Court's review jurisdiction. By contrast, appellant's reading, which severely twists the plain language of Section 1257, serves none of the policies that have been manifested by Congress in defining this Court's appellate jurisdiction.* If appellant is correct in treating acts of Congress of local application as "state" statutes, the result would be extraordinary in light of the other statutory review provisions: there would be an appeal as of right to this Court when such statutes are upheld as constitutional (28 U.S.C. 1257(2)) but not when they are struck down (28 U.S.C. 1257(1) and (3)). But treating such statutes as statutes of the United States pre-

* Appellant contends, at least by implication (Br. 17–18), that if an appeal as of right is not available in cases upholding statutes applicable only to the District of Columbia, no litigant in the District of Columbia Court of Appeals will ever be able to bring an appeal as of right to this Court under Section 1257(2). While the pertinence of this argument is questionable, it overlooks the fact that Section 1257(2) refers to "a statute of any state"; the court below may be called upon to examine the validity of a statute of one of the fifty states that affects the interests of litigants before it. A judgment of a state court upholding a statute of another state against a claim that it conflicted with federal law would raise an issue under the Supremacy Clause (Article VI, clause 2) of the Constitution; such an issue should be resolved by this Court in the last instance. Hence review of

serves the congressional policies inherent in the existing symmetry of the statutory pattern.'

Accordingly, the Court should treat the papers on which this appeal was taken as a petition for a writ of certiorari and determine as a matter of discretion whether to decide the issues raised on the merits. See 28 U.S.C. 2103.

II. THE DISTRICT OF COLUMBIA COURTS ESTABLISHED UNDER THE 1970 COURT REORGANIZATION ACT MAY EXERCISE JURISDICTION OVER LOCAL FELONY PROSECUTIONS

A. INTRODUCTION: THE DISTRICT OF COLUMBIA COURT SYSTEM

This case involves a constitutional challenge to the validity of the establishment of the courts of the District of Columbia. In enacting the District of Colum-

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such judgments by appeal is appropriate and is provided by Section 1257(2). See *Young* v. *Masci*, 289 U.S. 253. But a similar judgment upholding a congressional enactment of exclusively local application does not implicate Supremacy Clause values. Thus review of such judgments may appropriately be restricted, as we believe Congress has done in Section 1257(3), to this Court's certiorari jurisdiction.

'Appellant suggests that *Balzac* v. *Porto Rico*, 258 U.S. 298, supports his position. But the statute of local application challenged there was enacted not by Congress but by the territorial legislature; it was therefore not a statute of the United States and the only issue presented was whether an enactment by the territorial legislature was a "statute of [a] state" for purposes of the federal review statute. This Court held that such an enactment was a state statute for these purposes. The reasoning of that decision apparently was abandoned in *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42, n. 1. But the result in *Balzac*, now codified in 28 U.S.C. 1258(2), granting review as of right from judgments upholding territorial laws against claims of conflict with federal law, may be rationalized on Supremacy Clause grounds. See notes 5 and 6, *supra*. No similar argument is available to petitioner here.

bia Court Reorganization Act of 1970, Pub. L. 91–358, 84 Stat. 473, *et seq.*, Congress comprehensively restructured the court system of the District.[8] Before passage of that Act, the local court system in the District of Columbia had consisted of one trial court with limited jurisdiction over general categories of cases, known as the District of Columbia Court of General Sessions; two trial courts of special jurisdiction, the Juvenile Court of the District of Columbia and the District of Columbia Tax Court; and one appellate court, the District of Columbia Court of Appeals, whose judgments were subject to review by the United States Court of Appeals for the District of Columbia Circuit. D.C. Code (1967 ed.) §§ 11–321, 11–701, 11–901, 11–1501, 40–603–1.

Prior to the 1970 Act, the criminal jurisdiction of the Court of General Sessions was restricted to misdemeanors and petty offenses. D.C. Code (1967 ed.) § 11–963. Its civil jurisdiction extended only to civil actions involving not more than $10,000 and did not embrace actions involving title to real estate. D.C. Code (1967 ed.) § 11–961. Cases arising under local District of Columbia law which were not cognizable in the local court system, including felony prosecutions for violations of the District of Columbia Code, were tried in the United States District Court for the District of Columbia. See D.C. Code (1967 ed.) § 11–521. And the federal district court had concurrent juris-

[8] For a thorough review of that Act, see Williams, *District of Columbia Court Reorganization, 1970*, 59 Geo. L.J. 477 (1971).

diction over most of the criminal and civil matters cognizable in the local courts. D.C. Code (1967 ed.) §§ 11–521, 11–522, 11–523.

As a consequence of its broad jurisdiction over purely local matters, the federal district court had accumulated a large backlog of pending criminal cases, evoking widespread concern over "the profound adverse effect of congestion and delay on the administration of justice." S. Rep. No. 91–405, 91st Cong., 1st Sess., p. 3. Noting "the anomaly inherent in burdening a Federal district court with sole jurisdiction over the full panoply of local legal matters" (*ibid.*), the Senate Committee on the District of Columbia summarized the problem faced by the district court in the following terms (*ibid.*):

> The burden is acute in the District of Columbia, the seat of the Federal Government, where, in the absence of inordinately crowded dockets (both civil and criminal), a substantial and greater quantum of genuinely Federal litigation might best and conveniently be brought. Yet, at present the median time for civil jury trial in the U.S. District Court for the District of Columbia is nearly double the median for Federal district courts nationwide. In recent years as many as 12 out of 14 judges of the Federal court in the National Capital have been assigned full time to the trial of local felony offenses.

It was to remedy this situation that the Court Reorganization Act was passed. The Act consolidated the local trial courts into a new court of general local

jurisdiction, the Superior Court of the District of Columbia. See Section 111 of the Act, 84 Stat. 482; D.C. Code § 11–901. The Superior Court was given jurisdiction "of any criminal case under any law applicable exclusively to the District of Columbia" (Section 111 of the Act, 84 Stat. 486; D.C. Code § 11–923(b)) and, with the exception of matters over which exclusive jurisdiction is vested in a federal court, "of any civil action or other matter (at law or in equity) brought in the District of Columbia" (Section 111 of the Act, 84 Stat. 484; D.C. Code § 11–921(a)).[8]

At the same time, the Act eliminated the federal district court's special jurisdiction over local civil matters and reduced its jurisdiction over local criminal offenses to prosecutions involving a federal (United States Code) offense. See Section 111 of the Act, 84 Stat. 476, 477; D.C. Code §§ 11–501, 11–502. The former appellate jurisdiction of the United States Court of Appeals for the District of Columbia Circuit over the judgments of the District of Columbia Court of Appeals, with only a minor exception, was also eliminated (Section 111 of the Act, 84 Stat. 476; D.C. Code § 11–301) and the District of Columbia Court of Appeals was declared to be the "highest court of the District of Columbia," whose judgments are reviewable directly by this Court (Section 111 of the Act, 84 Stat. 475; D.C. Code § 11–102).

Thus the Act transformed the court system of the District of Columbia into two distinct and parallel

[8] The jurisdictional changes brought about by the Act were made effective in stages over the course of a transitional period.

structures of local and federal courts, each operating within its own sphere of pertinent jurisdiction, similar to the traditional division between state and federal court systems existing in the states. In addition to increasing the responsibilities of the local judiciary, the Act lengthened the judges' tenure, from 10 to 15 years, and raised their salaries. Section 111 of the Act, 84 Stat. 479, 482, 491; D.C. Code §§ 11–703, 11–904, 11–1502. See H. Rept. No. 91–907, 91st Cong., 2d Sess., pp. 37–39. It is the limited tenure provision that is at the heart of appellant's claim that he could not constitutionally be tried before the District of Columbia Superior Court.

B. CASES ARISING UNDER THE LAWS OF THE UNITED STATES NEED NOT BE TRIED IN COURTS CREATED UNDER ARTICLE III OF THE CONSTITUTION OR EXERCISING THE JUDICIAL POWER OF THE UNITED STATES

Article III, section 1 of the Constitution establishes the framework for the Judicial Branch of the national government. It provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Judges of these courts are to hold office during their good behaviour. The Article then states that this "judicial Power shall extend" to various classes of cases, including those "arising under * * * the Laws of the United States" (Article III, section 2). The issue appellant raises about the validity of the court that tried him could fairly be formulated as follows: Must every case involving enforcement of an act of Congress be tried in a fed-

eral court established under Article III? Appellant's position on this question (which he casts in somewhat different terms) rests upon several fundamental misconceptions which are for the most part assumed rather than argued. We shall endeavor to show below that, when these misconceptions are removed, there remains no constitutional impediment to the congressional decision to allow "local" criminal cases to be prosecuted in the courts of the District of Columbia, even though these courts are not established under, or in conformity with, Article III of the Constitution.

These misconceptions, briefly, are as follows: That Congress must confer all of the potential jurisdiction to which the "judicial Power of the United States extends" on national courts created under Article III; that any court entertaining or adjudicating a case arising under the laws of the United States must be exercising the judicial power of the United States; and that violations of criminal statutes enacted by Congress form a distinct class of cases for Article III purposes. We shall contend, on the contrary, that Congress had no obligation to create a national judiciary; that cases arising under the laws of the United States—civil and criminal—may be adjudicated by state courts and other non-Article III courts; and that courts entertaining such cases are not thereby exercising the "judicial Power of the United States" within the meaning of Article III and are thus not governed by its qualifications. And, more specifically, we shall show that, in limited situations, Congress has power to create courts exercising judicial power without giv-

ing such courts the status of Article III courts; that Congress' plenary power over the District of Columbia authorizes creation of a non-Article III court system for "local" matters; and that felony prosecutions may be entertained by these courts.

Appellant contends that the terms of Article III require that his prosecution for a felony proscribed by an act of Congress take place before a judge with life tenure. Although he makes no attempt to discuss the implications of his position, there is little support for his assertion that a *felony statute* is in a special category for purposes of Article III. Nothing in that Article distinguishes in its reach and effect between civil and criminal cases or between different levels of criminal cases. Thus, appellant's arguments about the lack of constitutional power to authorize enforcement of acts of Congress in non-Article III courts must apply equally to civil claims under such acts.

In any event, the principal defect in appellant's position lies in his assumptions that, because Article III says that federal judicial power "extends" to all cases arising under the laws of the United States, Congress must vest such federal power in courts established under that Article and must do so exclusively. But these assumptions are not supported by the text of Article III or by constitutional history. Article III reflects the compromise solution reached at the Constitutional Convention of 1787 between proponents of a strong central government with an independent court system and the opponents of such a development. The decision was made to provide for a Supreme Court

but to *authorize* Congress to create an "inferior" federal judiciary without requiring that it do so." It was the explicit expectation of the Framers that a system of *inferior* federal courts might not be established. Indeed, although the First Congress did establish a national court system, there was no attempt to vest in the new federal courts all of the jurisdiction to which Article III says the federal judicial power "extends." The classes of cases to be entertained in federal courts were limited. Instead, as had been expected (see Hamilton, *The Federalist No. 82*), "Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws." *Zwicker* v. *Koota*, 389 U.S. 241, 245. It was not until 1875 that Congress finally conferred general "federal question" jurisdiction on the federal courts to entertain all cases arising under the laws of the United States, and even then state courts retained concurrent jurisdiction over all of these cases and had exclusive jurisdiction (as they still do) in cases not satisfying the minimum jurisdictional amount. See Act of March 3, 1875, C. 137, 18 Stat. 470; *District of Columbia* v. *Carter*, No. 71-504, decided January 10, 1973, slip op. 10, n. 20.

Thus, for nearly a century, as the Framers anticipated, cases "arising under * * * the Laws of the United States" (with limited exceptions) *had* to be adjudicated in non-Article III courts—the courts of the several states—subject of course to ultimate review by

[10] See Hart & Wechsler, *The Federal Courts and the Federal System*, 17–18 (1953), summarizing the debates of the Convention.

this Court, whose establishment was mandated by Article III."

Constitutional history also shows that there is no support for the distinction appellant implies, but does not argue or support, between civil and criminal cases, for the enforcement of acts of Congress in non-Article III courts has not been confined to civil matters alone. From at least 1794 Congress has provided for enforcement of fines, penalties, and forfeitures under federal statutes in state courts. See Charles Warren's extensive survey in *Federal Criminal Laws and the State Courts,* 38 Harv. L. Rev. 545, 551–553, 570–572 (1925). As early as 1799 Congress provided for prosecution of criminal offenses against the federal postal laws in state courts of competent jurisdiction. See Act of March 2, 1799, c. 43, § 28, 1 Stat. 733, 740. Punishment for these offenses, including embezzlement and robbery, could be up to ten years' imprisonment or, for a second offense, death. See Sections 14, 15 and 20 of that Act. Under statutes like these, the United States actually prosecuted criminal cases in state courts. See Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49, 54–55 (1924).

The constitutional authority to enforce federal penal statutes in non-Article III courts of the states is unquestionable. Although undeniably involving the assertion of judicial power over "cases arising under

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" See Hart & Wechsler, *supra,* at 18, 418–420; Section 25 of the Judiciary Act of 1789, 1 Stat. 85; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304; *Cohens* v. *Virginia,* 6 Wheat. 264,

the laws of the United States," this Court has never considered Article III violated by such enforcement. See generally *Claflin* v. *Houseman*, 93 U.S. 130; *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U.S. 230. Indeed, in *Testa* v. *Katt*, 330 U.S. 386, after reviewing some of the constitutional history we have briefly discussed involving congressional grants of authority to state courts to entertain prosecutions for "federal crimes" (330 U.S. at 390), a unanimous Court held that Congress can constitutionally require "state courts to enforce federal penal laws" (330 U.S. at 391).[12]

C. CONGRESS CAN ESTABLISH COURTS THAT DO NOT HAVE THE ATTRIBUTES OF "INFERIOR FEDERAL COURTS" CREATED UNDER ARTICLE III

In light of the settled practice of allowing cases arising under the laws of the United States to be heard and determined in state courts, whose judges typically do not serve for life and who do not exercise the "Judicial Power of the United States" under Article III, Section 1, it is not surprising that Congress itself has long been held to be able to establish non-Article III courts for specific purposes. Appellant ar-

[12] It was suggested by two of the most distinguished commentators on federal jurisdiction that the state courts could be granted jurisdiction to try federal prosecutions involving "* * * illicit dealings in narcotics, thefts of interstate freight and automobiles, schemes to defraud essentially local in their operation but involving a minor use of the mails, * * * and like offenses * * *." Frankfurter and Landis, *The Business of the Supreme Court* 293 (1928). See also Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 Harv. L. Rev. 966 (1947).

gues that, except for the federal courts under Article III, the other entities the Congress has established and called "courts" have exercised "legislative" or "executive" power, rather than "judicial power" (Br. 24–27); but this contention does not withstand analysis. Historical practice and clear precedent show that Congress has power, apart from Article III, to establish courts that exercise judicial power, even though their judges serve for fixed terms.

Article III relates to the definition of the third branch of the national government—the vigorously debated "national judiciary" whose very existence, except for this Court, the Framers left to congressional discretion. The Framers were concerned about the character of such an ambitious system of national courts and they worked to assure the prospective incumbents a measure of security and independence. But these basic constitutional judgments did not apply to courts of special and limited function that Congress might create for other purposes. These courts are called "legislative" courts—not because, as petitioner seems to imply (Br. 25–26), they exercise merely "legislative" responsibilities, but because their creation is traceable to the exercise of legislative power under Article I unrelated to the organic provisions of Article III. Legislative courts need not share the attributes of Article III courts, such as tenure and salary. Despite appellant's argument, the authority to establish these courts is not based on a notion that they are exercising something other than "judicial power." On the con-

trary, they are courts in every sense, just as are the courts of the states that do not follow the Article III model. "Legislative" courts are not bound by Article III for the simple reason that they are not part of the national judiciary that Article III authorized. They are not, in that sense, exercising the "judicial Power of the United States"; as the history of state court enforcement of federal law vividly demonstrates, the mere fact that a court is enforcing a law of the United States does not mean that that court is exercising the "judicial Power of the United States" for purposes of Article III.

1. Congress May Establish Legislative Courts Not Subject to Article III Restrictions on Tenure

Article III, Section 1, of the Constitution provides that the judicial power of the United States is vested "in one supreme Court, and in such inferior Courts as the Congress may from time to time * * * establish" and that the judges of such courts "shall hold their Offices during good Behaviour." [12] This provision is complemented by Article I, Section 8, clause 9, which grants Congress the power "[t]o constitute Tribunals inferior to the supreme Court." The jurisdiction of such courts is limited by Article III, Section 2. See *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582. And the judges of the courts established

[12] Article III, Section 1 also provides that the salaries of such judges shall be undiminished during their continuance in office. The posture of this case is such that this additional guarantee need not be discussed separately.

by Congress pursuant to Article I, Section 8, clause 9, enjoy the tenure prescribed by Article III, Section 1.

It has been recognized since at least 1828, however, that Congress, in the exercise of other powers, may establish courts whose judges do not possess the "good behaviour" tenure afforded by Article III and who exercise judicial power that is authorized under Article I and not derived from the grant of jurisdiction in Article III. *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546. See generally, Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133, 137–138 (1962). As this Court noted in *Ex parte Bakelite Corporation*, 279 U.S. 438, 449:

> * * * it has long been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. * * * [T]hose [courts] created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold [office] for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

Pursuant to its authority to create legislative courts, with judges lacking "good behaviour" tenure, Congress has in the past established a variety of non-

Article III courts, including the following: territorial courts, established under Article IV, Section 3, clause 2 (see, *e.g.*, *McAllister* v. *United States*, 141 U.S. 174; *The City of Panama*, 101 U.S. 453; *American Insurance Co.* v. *Canter*, *supra*); consular courts and courts exercising jurisdiction over Indian affairs, under Article I, Section 8, clause 3 (see, *e.g.*, *Wallace* v. *Adams*, 204 U.S. 415; *In re Ross*, 140 U.S. 453); courts martial, under Article I, Section 8, clause 14 (*Reid* v. *Covert*, 354 U.S. 1, 41–42 (concurring opinion of Mr. Justice Frankfurter); *Dynes* v. *Hoover*, 20 How. 65); the Court of Customs Appeals and the Court of Claims, under Article I, Section 8, clause 1 (*Williams* v. *United States*, 289 U.S. 553; *Ex parte Bakelite Corporation*, *supra*) [14]; and the United States Tax Court, also under Article I, Section 8, clause 1 (Section 7441 of the Internal Revenue Code, effective December 30, 1969; see *Burns, Stix Friedman & Co., Inc.* v. *Commissioner*, 57 T.C. 392). In addition, since the creation of the District of Columbia, the courts there have included inferior courts, established under Article I, Section 8, clause 17, whose judges have been appointed for terms limited to not more than ten years. See Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 899 (1930).

[14] In *Glidden Co.* v. *Zdanok*, 370 U.S. 530, this Court concluded that in light of supervening legislation, in which Congress declared its purpose to establish the Court of Customs and Patent Appeals (the successor to the Court of Customs Appeals) and the Court of Claims as Article III courts, the judges of those courts now have constitutionally guaranteed "good behaviour" tenure.

2. Legislative Courts May Exercise Jurisdiction Over Inherently Judicial Matters Arising Under the Laws of the United States

Legislative courts, like courts created under Article III, exercise jurisdiction over cases arising under the laws of the United States. See, *e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 545 n. 13; *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582, 641–643 (dissenting opinion of Chief Justice Vinson). Appellant contends (Br. 22–29), however, that since this litigation not only arose under the laws of the United States (see p. 15, *supra*) but also was of a kind requiring judicial, rather than executive or legislative, determination, he was entitled to be heard before an Article III court. But this contention is contrary to the decisions of this Court regarding the jurisdiction of both state courts and congressionally created "legislative courts" with respect to a wide range of inherently judicial matters.

Appellant offers no analysis of what constitutes a case requiring "exercise of the judicial power" (Br. 26). But the indicia of judicial power—the binding adjudication of disputed facts and the issuance of an authoritative judgment—are exhibited by many courts not possessing the attributes of Article III federal courts. We have already seen that state courts, unquestionably exercising "judicial power," have since the foundation of the Constitution entertained and decided cases arising under the laws of the United States.

Similarly, "legislative courts" created by Congress have long exercised jurisdiction over inherently ju-

dicial matters. As appellant concedes (Br. 25–26, n. 28), the legislative courts in federal territories have always been courts of general jurisdiction, capable of trying a wide-ranging assortment of inherently judicial cases, including criminal prosecutions as well as civil actions and suits in admiralty. See, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145; *Good* v. *Martin*, 95 U.S. 90; *American Insurance Co.* v. *Canter*, 1 Pet. 511.[18] Courts martial of course possess "the power to try and to punish" (*Relford* v. *United States Disciplinary Commandant*, 401 U.S. 355, 367), and their jurisdiction embraces "not only the power to hear and determine the case, but the power to execute and enforce the sentences of the law" (*Carter* v. *McClaughry*, 183 U.S. 365, 383). Similarly, consular courts exercised jurisdiction over criminal as well as civil matters. *In re Ross*, 140 U.S. 453. As the Court observed in *Williams* v. *United States*, 289 U.S. 553, 567, putting to rest the argument appellant seeks to revive:

> If the power exercised by legislative courts is not *judicial* power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof. [Emphasis in original.]

[18] At present, the district courts of Guam, the Virgin Islands, and the Canal Zone are legislative courts with judges having limited tenure. 48 U.S.C. 1424b and 1614; Title 3 Canal Zone Code § 5. These courts have both original jurisdiction over federal questions and original and appellate jurisdiction over local matters. 48 U.S.C. 1424 and 1612; Title 3 Canal Zone Code § 141. In American Samoa and the Pacific Trust Territory, judicial power is vested in such person or persons as the President may direct. 48 U.S.C. 1661(c) and 1681(a).

As one of the definitive works on the federal courts has pointed out, "[i]t must be concluded * * * that at least in a qualitative sense legislative courts exercise 'judicial power' * * *." See "Note on Legislative Courts" in Hart & Wechsler, *The Federal Courts and the Federal System*, at 348. They give judgments in disputes satisfying the constitutional standards for "cases" or "controversies." In arriving at their judgments, they are free to pass upon the constitutionality of relevant acts of Congress or of executive officials. They can be given the power to punish for contempt. Their judgments are binding for purposes of *res judicata*. And this Court frequently reviews the judgments of such legislative courts in the exercise of its "appellate jurisdiction." See generally *Pope* v. *United States*, 323 U.S. 1, 12–14. Thus there can be no serious challenge to the proposition that non-Article III courts created by Congress can and do constitutionally exercise "judicial power." [16] As we shall now

[16] There may be limits to congressional power to create non-Article III courts. For example, it might be argued that to permit Congress to establish a special court for the determination of issues arising under each legislative power would undercut the general federal question jurisdiction authorized by Article III and subvert the constitutional design of a national judiciary. But such considerations are not present when Congress establishes courts for the administration of justice in an area in which Congress has plenary, not limited, delegated powers. For example, legal matters arising in federal territories typically are of local concern and involve local, not national, law. It was not part of the constitutional design that the national judiciary should concern itself with such matters. See Hamilton, *The Federalist No. 80*. But it is nevertheless necessary that the courts sitting in such areas be courts of general

discuss, Congress has the power to create non-Article III courts to exercise such judicial power over local matters in the District of Columbia, including felony prosecutions.

D. LEGISLATIVE COURTS IN THE DISTRICT OF COLUMBIA MAY TRY LOCAL FELONY PROSECUTIONS

1. Congress may establish legislative courts of local jurisdiction for the District of Columbia

Article I, Section 8, clause 17 of the Constitution grants Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia]." As this Court has often noted, this provision grants Congress "plenary power over the District of Columbia" including "all the legislative powers which a state may exercise over its affairs." See *District of Columbia* v. *Carter*, No. 71–564, decided January 10, 1973, slip op. 11–12; *District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U.S. 100, 108; *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 435; *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407.

Plenary legislative power over a geographical area naturally embraces the establishment of a court system for the adjudication of local disputes. *Capital Traction Co.* v. *Hof*, 174 U.S. 1. As we have seen (*supra*, pp. 32–37), when Congress establishes courts for the resolution of purely local issues in an area over which it

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subject matter jurisdiction capable of resolving disputes inherently judicial in nature. It was to meet this felt necessity for local courts in areas subject to federal control that this Court first articulated the doctrine of legislative courts. *American Insurance Co.* v. *Canter*, 1 Pet. 511.

has plenary authority, those courts need not comply with the requirements of Article III. Indeed, as appellant acknowledges (Br. 35, n. 42), the courts of purely local jurisdiction established by Congress for the District of Columbia have historically been legislative courts whose judges held only limited tenure. See *supra*, pp. 21–25, 34. This Court has acknowledged the constitutionality of this practice. *Capital Traction Co.* v. *Hof*, *supra*. A majority of the court has further indicated that Congress, in exercise of its plenary power over the District of Columbia, could establish legislative courts in the several states for adjudication of causes between their citizens and the citizens of the District of Columbia. *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582, 590, 644. Thus the power of Congress to create legislative courts of local jurisdiction for the District of Columbia is too clear to be debated.

Furthermore, there are substantial reasons why the local courts of the District of Columbia *should* have a different constitutional status than do the federal courts. The constitutional provision in Article III, providing for a federal judiciary, evolved from a recognition that a federal forum might be desirable to adjudicate federal questions and to resolve disputes between citizens of different states. See 1 Farrand, *The Records of the Federal Convention*, 124–125, 231, 238 (1911); 2 Farrand, *supra*, 39, 46, 146; 3 Farrand, *supra*, 206–207. The limited jurisdiction allowed to the federal courts by Article III, Section 2 of the Constitution reflects the inherently national nature of the purposes those courts were meant to serve. See Hamilton, *The Fed-*

eralist No. 80 (explaining the "proper extent of the federal judicature"). It was not intended that a local court system established by Congress to meet the day-to-day adjudicative needs of the residents of the District of Columbia would be a part of the judiciary organized under Article III, which Hamilton described as "national tribunals." The function served by the District of Columbia court system is not national but local, and by necessity its jurisdiction extends beyond the categories of cases to which the "judicial power" of the federal judiciary extends under Article III.

Furthermore, at the time of the Constitutional Convention it was apparently generally assumed that the citizens of the district which was to become the seat of the government would themselves have a municipal legislature for all local purposes. See Madison, *The Federalist No. 43*. Presumably it was also anticipated that such a municipal legislature would establish a local judiciary to serve local needs, not governed by the attributes specified by Article III. Cf. *District of Columbia* v. *John R. Thompson Co., Inc., supra*. Moreover, the commentators have generally recognized that the need for flexibility in local administration and the other practicalities of local government in the District of Columbia militate in favor of fixed terms, or limited tenure, for local judges. See Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 902 (1930); Note, *The Distinction Between Legislative and Constitutional Courts and Its Effects on Judicial Assignment*, 62 Colum. L. Rev. 133, 152–153 (1962); Note, *The Legislative Court Problem: A Proposed Solution*, 38 N.Y.U. L. Rev. 302, 316–317 (1963).

For reasons such as these the courts of exclusively local jurisdiction in the District of Columbia have always had judges with limited tenure. The question of judicial tenure was fully discussed during legislative consideration of the Court Reorganization Act, and Congress concluded that the local nature of the District of Columbia courts made retention of the feature of limited judicial tenure appropriate. H. Rep. No. 91-907, 91st Cong., 2d Sess., pp. 38-39.

This Court's decision in *O'Donoghue* v. *United States*, 289 U.S. 516, is not a barrier to the creation of a legislative court system of purely local subject-matter jurisdiction for the District of Columbia. That case involved courts which were "of equal rank and power with those of other inferior courts of the federal system * * *." *O'Donoghue* v. *United States, supra*, 289 U.S. at 534. This Court expressly noted (289 U.S. at 544), quoting from *Federal Trade Commission* v. *Klesner*, 274 U.S. 145, 156, that:

> The parallelism between the Supreme Court of the District [now the United States District Court for the District of Columbia] and the Court of Appeals of the District [now the United States Court of Appeals for the District of Columbia Circuit], on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the States would be regarded as within federal jurisdiction, is complete.

In concluding that those courts of federal jurisdiction in the District of Columbia were within

Article III, this Court drew support from three principal lines of argument. *First,* the Court distinguished between the transitory nature of the territories, where even the courts of general federal question jurisdiction may be "legislative" in the non-Article III sense, and the permanency of the District of Columbia. *Second,* the Court employed what may now be viewed as a rudimentary equal protection analysis (289 U.S. at 540):

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guarantees, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III. We think it is not reasonable to assume that the cession stripped them of these rights * * *.

On the basis of this analysis the Court determined that Congress had the power to establish Article III courts in the District of Columbia. *Third,* the Court proceeded to examine the legislative intent. Noting that the courts in question had been granted the same federal question and diversity jurisdiction as the other inferior federal courts, and that their judges had historically been afforded good behavior tenure, the Court concluded (289 U.S. at 549–550) that "Congress entertained the view that the [Supreme Court and the Court of Appeals] of the District and the in-

ferior courts of the United States sitting elsewhere, stood upon the same constitutional footing." That is, the Court found that Congress had intended to establish these courts under Article III.

The case now before this Court is entirely different from *O'Donoghue*. First, the distinction drawn in *O'Donoghue* between territories and the District of Columbia is no longer wholly apt or relevant. The 1970 Act does not create legislative courts of general federal question jurisdiction for the District of Columbia as Congress has for the territories; its goal was the narrower one of creating separate legislative courts of local jurisdiction. In addition, the remaining territories, Puerto Rico, Guam, the Canal Zone, American Samoa and the Pacific Trust Territory, do not appear to have a merely transitory existence 'necessarily limited to the period of pupilage." 289 U.S. at 537. And although the District of Columbia is a permanent entity within the United States, serious congressional consideration of relinquishing direct legislative authority and substituting "home rule" demonstrates an analogous reason why—just as with "territorial courts"—it was appropriate for Congress to establish a local court system whose judges have a limited tenure.

The second reason in *O'Donoghue* does not apply here at all. The courts below are not courts of general federal jurisdiction having "equal rank and power with those of other inferior courts of the federal system." They are, rather, designedly equivalent in function to state courts; they are courts of essentially local jurisdiction. Consequently, their utilization infringes no principle of equal protection: on the contrary, under

the 1970 Act citizens of the District of Columbia, like citizens of the several states, are provided with a federal forum for the litigation of causes that would be triable in federal court in the states, and with a local forum for the adjudication of essentially non-federal "local" disputes.

Third, the congressional intention to establish legislative courts in this case is clear. In passing the Court Reorganization Act, Congress strongly manifested its intention that these local courts be non-Article III legislative courts, both by expressly so stating (Section 111 of the Act, 84 Stat. 475; D.C. Code § 11–101) and by limiting judicial tenure and providing for removal or suspension without salary by a process other than impeachment (Section 111 of the Act, 84 Stat. 491, 494–495; D.C. Code §§ 11–1502, 11–1526).

Accordingly, nothing said by this Court in *O'Donoghue* limits the power of Congress to establish local legislative courts for the District of Columbia. Indeed, such courts were in existence at the time of that decision and neither this Court, nor, to our knowledge, any other court ever intimated the slightest doubt concerning their constitutionality. Furthermore, as we have indicated above (*supra*, p. 39), subsequent to the decision in *O'Donoghue* a majority of this Court, in *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc., supra* acknowledged the authority of Congress to establish legislative courts with non-federal jurisdiction on behalf of the citizens of the District of Columbia.

B. There is No Constitutional Ground for Excluding Local Felony Prosecutions From the Jurisdiction of Legislative Courts for the District of Columbia

Appellant's claim that he can only be tried before a judge with good behaviour tenure rests wholly on Article III of the Constitution. He has not suggested that the absence of such a judge in the trial of a felony prosecution denies due process. Nor could he advance such a claim. As the court below noted (A. 57, n. 12) only four states guarantee good behaviour tenure to their judges, and this Court has never suggested that the judicial tenure provided by the other forty-six states falls short of that required by due process. Furthermore, this Court has upheld felony convictions in territorial courts presided over by judges with limited tenure. See, *e.g., Reynolds* v. *United States*, 98 U.S. 145.

For similar reasons, appellant cannot claim that he has been denied equal protection of the laws. In legislating exclusively for the District of Columbia, Congress may in the exercise of its plenary power enact local laws substantively different from national laws. Therefore, it may prescribe procedures for the adjudication of local matters, including prosecutions of exclusively local offenses, different from those applicable to adjudication of matters involving laws national in scope. Congress has limited the criminal jurisdiction of the District of Columbia Superior Court to prosecutions arising "under any law applicable exclusively to the District of Columbia." D.C. Code § 11–923(b). Thus individuals charged with fed-

eral felonies in the District of Columbia are tried in the United States Court, just as they are elsewhere. But appellant belongs to the different class of persons charged only with local, non-federal crimes; the trial of all such persons in non-Article III courts satisfies the requirements of equal protection.

This leaves only appellant's Article III argument, and it is insufficient. We have already contended that nothing in the Constitution prohibits non-Article III courts—whether state courts or congressionally created "legislative courts"—from entertaining cases arising under the laws of United States, including penal and criminal laws. We have also seen that Congress may create legislative courts for the District of Columbia capable of exercising jurisdiction over local matters which are inherently judicial. There is no constitutional ground for excluding local felony prosecutions from that jurisdiction. See *Lurk* v. *United States*, 296 F. 2d 360 (C.A. D.C.), affirmed *sub nom. Glidden Co.* v. *Zdanok*, 370 U.S. 530.

As appellant acknowledges (Br. 33–36), legislative courts established for the District of Columbia have exercised jurisdiction over misdemeanors and petty offenses since 1801. Appellant seemingly rests his entire case on a distinction between misdemeanor prosecutions, which he claims involve only " 'general administrative, police, and legislative powers' " (Br. 35), and felony prosecutions, which require the exercise of "judicial power" (*ibid.*). This argument is based on the mistaken notion that legislative and other non-

Article III courts may not try inherently judicial cases arising under the laws of the United States. See *supra*, pp. 25–30, 35–38.

Furthermore, there is no distinction between misdemeanor and felony prosecutions which is relevant to this issue. Due process considerations require the former as well as the latter to be tried before a judicial tribunal. *In re Oliver*, 333 U.S. 257. Cf. *Groppi v. Wisconsin*, 400 U.S. 505. Indeed, even the assertion of petty offense jurisdiction requires the exercise of an exclusively judicial power. *Ward* v. *Village of Monroeville*, No. 71–496, decided November 14, 1972. Defendants charged with misdemeanors, and even of petty offenses for which imprisonment is a penalty, are ensured the right to counsel. *Argersinger* v. *Hamlin*, 407 U.S. 25. Defendants charged with offenses carrying a penalty of only 90 days' imprisonment are granted the full right of cross-examination. *District of Columbia* v. *Clawans*, 300 U.S. 617. Defendants charged with offenses of a serious character, whether misdemeanors or petty offenses, are entitled to trial by jury. *Duncan* v. *Louisiana*, 391 U.S. 145; *District of Columbia* v. *Colts*, 282 U.S. 63; *Callan* v. *Wilson*, 127 U.S. 540. Indictments by a grand jury have been required in cases involving serious misdemeanors tried by legislative courts in the District of Columbia. *United States* v. *Moreland*, 258 U.S. 433. Thus this Court has not distinguished between the kind of proceeding required for conviction of a felony and that required in a misdemeanor prosecution.

In short, contrary to appellant's contention, the nature of both proceedings involves the exercise of

true "judicial power." Such judicial power has always been exercised by legislative courts in the District of Columbia.

In enacting the Court Reorganization Act in 1970, Congress merely sought to establish a local court system, comparable to those in the several states, for adjudication of all non-federal matters arising in the District of Columbia. The purpose of this legislation was to reduce significantly the caseload of the basic federal courts in the District of Columbia while still preserving to them their distinctively federal jurisdiction. Furthermore, by creating a dual court system with separate and distinct jurisdictions, Congress eliminated the anomaly, recognized by this Court in *O'Donoghue v. United States, supra,* of Article III courts with extensive non-Article III jurisdiction. See *Hobson v. Hansen,* 265 F. Supp. 902, 925–930 (D.D.C.) (dissenting opinion of Judge Wright). In so doing, Congress naturally gave jurisdiction over the trial of felonies of an exclusively local nature to the local courts. At the same time, in order to preserve necessary flexibility Congress retained the feature of limited judicial tenure which since 1801 has characterized District of Columbia courts of local, non-federal jurisdiction. Nothing in Article III prohibited this sound legislative solution to the vexing problems inherent in the administration of justice in the District of Columbia.

II. THE SELECTIVE STOP OF AN AUTOMOBILE DRIVER FOR THE PURPOSE OF INSPECTING HIS DRIVING PERMIT AND VEHICLE REGISTRATION CERTIFICATE DOES NOT CONSTITUTE AN UNREASONABLE SEIZURE.[17]

Appellant claims (Br. 47–61) that the action of the police officers in initially stopping his automobile was unconstitutional because the officers lacked "'specific and articulable facts which, taken together with rational inferences from those facts, warrant[ed] that intrusion'" (Br. 48, quoting from *Terry* v. *Ohio*, 392 U.S. 1, 21).[18] In common with most states, the District of Columbia makes it unlawful for a motor vehicle to be operated unless the operator has the registration certificate either in his possession or in the vehicle and requires the operator of a vehicle to exhibit his driving permit to any police officer upon demand. D.C. Code (1967 ed.), §§ 40–104(a) and 40–301(c). Contrary to appellant's contention, in enforcing these requirements a police officer may lawfully make a "selective" stop of vehicle operators for the purpose of checking driving permits and registration certificates.

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[17] This Court may decline to consider appellant's Fourth Amendment claim. As appellant acknowledges (Br. 20), that claim is incapable of independently sustaining an appeal even assuming this case to be within this Court's appeal jurisdiction. Thus the Fourth Amendment issue "remains within * * * certiorari jurisdiction, and [this Court] may * * * decline to decide the merits of the issue, much as [it] would dismiss a writ of certiorari as improvidently granted." *Miskkin* v. *New York*, 383 U.S. 502, 512.

[18] Appellant does not challenge the reasonableness of the police action after the initial stop. As the court below observed (A. 65–66):

"* * * the officers had * * * stop[ped] appellant for the sole

It is generally recognized that "permission to operate a motor vehicle upon public highways is a license or privilege." *State* v. *Valstad*, 282 Minn. 301, 311, 165 N.W. 2d 19, 25. See, also, *Commonwealth* v. *Mitchell*, 355 S.W. 2d 686, 688 (Ky. Ct. App.); *City of Miami* v. *Aronovitz*, 114 So. 2d 784, 787 (Fla.). While licensing and registration procedures were originally instituted as revenue measures, they have come to serve public safety functions. "Consequently, it is very much in the public interest that law enforcement officers be permitted to make periodic check-ups on the driving license qualifications of those who operate motor vehicles on the highways." *City of Miami* v. *Aronovitz*, *supra*, 114 So. 2d at 788. So-called "spot checks"—*i.e.*, selective stops of motorists for routine inspection of their driving permits and registration certificates—are an accepted mode for accomplishing such check-ups. *State* v. *Valstad*, *supra*; *State* v. *Rankin*, 477 S.W. 2d 72, 75 (Mo.); *United States* v. *Lepinski*, 460 F. 2d 234, 237 (C.A. 10);

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purpose of asking him for his driving permit and auto rental agreement. Ordinarily, if he had produced these two documents in proper order the police would have been required to permit him to continue driving on his way without any further questioning. However, once he showed them a rental agreement which had apparently expired, they then had sufficient facts from which they might reasonably infer that he was in unauthorized possession of the car he was driving. Therefore, they were entitled to detain him until the rightful ownership and use of that car could be clarified.

"* * * the officers * * * were properly positioned alongside the car at the moment one of them saw the pistol in plain view and seized it. * * *"

United States v. *Ware*, 457 F. 2d 828, 830 (C.A. 7), certiorari denied, October 10, 1972, No. 71-6566; *United States* v. *Turner*, 442 F. 2d 1146, 1148 (C.A. 8); *United States* v. *Cross*, 437 F. 2d 385, 387 (C.A. 5); *Lipton* v. *United States*, 348 F. 2d 591, 593 (C.A. 9).

As the Tenth Circuit recently stated in *United States* v. *Lepinski*, *supra*, 460 F. 2d at 237, "the stopping of the vehicle and the demand [for permit and registration are] lawful and necessary in carrying out * * * statutes regulating motor vehicles." A contrary holding, as was observed by the Ninth Circuit in *Lipton* v. *United States*, *supra*, 348 F. 2d at 593, "would render unenforceable [a] * * * statute requiring that automobile drivers be licensed." [9]

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[9] The cases which appellant cites for the proposition that an "articulable suspicion" is necessary when a moving vehicle is stopped for an inquiry or for a license and registration check (Br. 52, nn. 72 and 73) do not support that proposition. There was, in those cases, a basis for suspicion or cause to stop the vehicles, but the opinions neither stated nor implied that without such suspicion or cause the stops would have been unlawful. To the contrary, *State* v. *Valstad*, *supra*, and *State* v. *Larkin*, *supra*, held that a police officer may stop a vehicle for the purpose of making a routine check, and in *Young* v. *United States*, 435 F. 2d 405, 408 (C.A. D.C.) it was simply stated that, because the police there had an articulable suspicion, "[w]e are not fairly confronted" with the issue of whether they could stop a vehicle in other circumstances. The "articulable suspicion" mentioned in *United States* v. *Fallon*, 457 F. 2d 15, 18 (C.A. 10), cited by appellant, was only that the occupants of the vehicle "were young and the car was a new and very expensive one," thus making them "conspicuous"; the same court held later in *United States* v. *Lepinski*, *supra*, that no grounds for suspicion are necessary. Nor did *City of Miami* v. *Kimovitz*, *supra*, and *Commonwealth* v. *Mitchell*, *supra*, hold, as appellant asserts (Br. 59), that only road blocks, and not spot

Ever since the invention of the automobile, driving on public streets has been considered a necessary subject of government regulation. Lawful operation of a motor vehicle depends on government licensing of the driver and registration of the vehicle. (Often, as in the District of Columbia, a safety inspection of the auto is part of periodic renewal of the registration.) Thus, the principles of *Terry* v. *Ohio*, 392 U.S. 1, are not directly relevant to the right of the police, acting in good faith and not as a pretext for some other purpose, to stop a vehicle for a license and registration inspection. See *United States* v. *Cross*, *supra*, 437 F. 2d at 387, n. 3. In *Terry* a pedestrian had been stopped for questioning. A pedestrian, of course, does not exercise a privilege for which a license is required when he walks abroad, and it is therefore reasonable to require the police to have some specific basis for detaining him against his will, even if only momentarily, for purposes of interrogation.[*] See also *Au Yi Lau* v. *Immi-*

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checks, are available as a means for inspecting licenses. What those two cases held impermissible is stopping a vehicle ostensibly for a license check but actually to provide an occasion for a more extensive search. And while it is true that *Edwards* v. *State*, 318 P. 2d 1021 (Okla.) held that a selective stop must be supported by reasonable cause, this was only because the relevant state statute so provided.

[*] Appellant's reliance upon *Sibron* v. *New York*, 392 U.S. 40, and *Adams* v. *Williams*, 407 U.S. 143, is misplaced. Those cases dealt with the "frisk" aspect of the "stop and frisk" rules enunciated in *Terry*; there is no claim here that the evidence against appellant was discovered by means of a "frisk." While it is true that the respondent in *Adams* was seated in an automobile when approached by a police officer, the officer's purpose was not to inspect his driver's license and vehicle regis-

gration and Naturalization Service, 445 F. 2d 217 (C.A.D.C.), certiorari denied, 404 U.S. 864. But, especially where, as in the District of Columbia, a licensed driver is obliged by statute to exhibit his license and registration on demand, the acceptance and use of a license to drive can properly be found to require the driver to submit to an infrequent, limited, and discretionary interruption of his free movement on the highways. By operation of the legislative licensing system, he has, in a very real sense, no "reasonable expectation of privacy" about the disclosure of his driver's permit and vehicle registration. See, generally, *Katz* v. *United States*, 389 U.S. 347, 361; *Terry* v. *Ohio*, *supra*, 392 U.S. at 9; *Mancusi* v. *DeForte*, 392 U.S. 364, 368; *United States* v. *Dionisio*, No. 71–229, decided January 22, 1973 (slip op. 12–14).

This principle is aptly illustrated by reference to cases dealing with searches of property. A building inspector normally needs a warrant to enter private premises to inspect for violations of the building code. *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541. On the other hand, no warrant is necessary to inspect the premises of a licensed business to ascertain whether there is compliance with the conditions of the license. *United States* v. *Biswell*, 406 U.S. 311. Cf. *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76.

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question but rather to question him about narcotics and a weapon. In *Davis* v. *Mississippi*, 394 U.S. 721, upon which appellant relies, the petitioner was not merely stopped for questioning but was arrested and brought to police headquarters for the purpose of obtaining fingerprints.

Furthermore, in *Terry*, as the Court's opinion acknowledged (392 U.S. at 23), the crux of the case was not the propriety of the police officer's initial confrontation with the citizen "but rather, whether there was justification for [the officer's] invasion of Terry's personal security by searching him for weapons in the course of that investigation." The Court's holding that an articulable basis for suspicion is both sufficient and necessary to conduct such a *search* was based on the assessment that even a "limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security * * *" (392 U.S. at 24–25). As the Court explained (392 U.S. at 16–17), "a careful exploration of the outer surfaces of a person's clothing all over his or her body * * * performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised" is not a "petty indignity" but "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."

The conduct now before the Court is poles apart. Spot checks for compliance with traffic licensing laws are so routine that no indignity or affront can be inferred. In addition, the oral request for the driver, motioned to the side of the road in an automobile, to display his license and registration bears none of the intrusive characteristics of a forcible physical search of the person. The Court made clear in *Terry* (392

U.S. at 20-21) that application of the "reasonableness" standard of the Fourth Amendment involves balancing the need to search against the invasion of privacy the search entails. Here we are not concerned with a search at all but with what constitutes at most a momentary detention. In light of the long settled and unique need to assure compliance with traffic laws by spot checking, and in light of the minimal interference with personal privacy that is occasioned, the "reasonableness" balance should be struck in favor of the constitutionality of this practice.

Although conceding the utility of the practice, appellant suggests that registration and permit inspections should be limited to "non-discriminatory and non-selective road blocks" (Br. 59). These would be effective, he suggests, because "[s]uch periodic, non-discriminatory inspections would doubtless become publicized in a given locality, thus acting as a further deterrent against unlicensed motorists taking to the public streets" (Br. 60, n. 85). While we fail to see why such a wholesale dislocation of the traffic flow is constitutionally preferable to selective "spot checks," the relative effectiveness of various enforcement techniques is a matter best left to the discretion of local officials, who may well conclude that random checks are more effective in keeping unlicensed motorists off the streets. The distinction was recognized in *United States* v. *Biswell, supra,* where this Court explained (406 U.S. at 316) that, when the conditions which inspections are intended to disclose are "relatively

difficult to conceal or to correct in a short time, * * * [p]eriodic inspection suffice[s], and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system * * *." But, the Court continued (*ibid.*), if the inspection authorized by the statute there at issue "is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential."

The same realistic approach should govern driver's license and vehicle registration inspections; a major deterrent against driving without possessing valid papers is the concern that an unannounced spot check might disclose the delinquency.[11] And, as with the compliance inspections in *Biswell*, temporary unannounced stops to check licenses and registrations pose at most only limited threats to the motorist's justifiable expectations of privacy, since, if he chooses to drive, he does so with the knowledge that he might be required at any time to establish that he is doing so in conformity with controlling statutes and regulations.

CONCLUSION

For the foregoing reasons, the Court should treat the case as before the Court on petition for a writ of certiorari. To the extent the merits of the case are

[11] In the present case, the stop of appellant was not entirely random, because the officers knew that the auto he was driving was a rental car and there had been prior experiences with unauthorized operation of such vehicles.

reached, the judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted.

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